



STATE OF DELAWARE  
JUSTICE OF THE PEACE COURTS

FAMILY COURT BUILDING  
22 THE CIRCLE, SUITE 120  
GEORGETOWN, DELAWARE 19947  
TELEPHONE: (302) 356-5871

PATRICIA WALSHER GRIFFIN  
CHIEF MAGISTRATE

320 N. FRENCH STREET  
11TH FLOOR  
WILMINGTON, DELAWARE 19801  
TELEPHONE: (302) 577-6001

**LEGAL MEMORANDUM 95-208**

**TO: ALL JUSTICES OF THE PEACE  
ALL JUSTICE OF THE PEACE CLERKS OF COURT**

**FROM: PATRICIA W. GRIFFIN  
CHIEF MAGISTRATE** *RG*

**DATE: OCTOBER 17, 1995**

**RE: APPELLATE PROCEDURES IN THE JUSTICE OF THE  
PEACE COURT**

---

Attached is a copy of a draft chapter on Justice of the Peace Court appellate procedures which I prepared for inclusion in the updated version of the Delaware Appellate Handbook. This chapter covers all aspects of Justice of the Peace Court appeals and, as a consequence, a number of Legal Memoranda or Policy Directives are supplanted by its holdings. Changes to existing Legal Memoranda/Policy Directives are as follows:

- Legal Memorandum 82-94, dated July 20, 1982, "Appeals from Justice of the Peace Court from Traffic Convictions" is **RESCINDED**.

- Legal Memorandum 82-94 (Supplement), dated December 9, 1982, "Appeals from Justice of the Peace Court Traffic Convictions" is RESCINDED.
- Legal Memorandum 82-94 (2nd Supplement), dated August 15, 1995, "Appeals from Justice of the Peace Court Traffic Convictions" is RESCINDED (but may continue to be reviewed for informational purposes only).
- Legal Memorandum 83-113, dated October 12, 1983, "Appeal Rights in Criminal Cases" is RESCINDED (but may be used for informational purposes only).
- Legal Memorandum 83-114, dated November 15, 1983, "Appeals from Civil Actions of Debt, Trespass or Replevin; Questions and Answers" is RESCINDED.
- Legal Memorandum 87-165, dated May 19, 1987, "The Difference Between Appeals De Novo and Actions in Certiorari" is RESCINDED (but may be used for informational purposes only).
- Legal Memorandum 94-201, dated September 1, 1994, "Motions for New Trial and Other Post Conviction Motions in Civil Cases: Tolling Time of Appeal" is RESCINDED (but may be used for informational purposes).
- Legal Memorandum 94-201 (Supplement), dated September 20, 1994, "Motions for New Trial and Other Post Conviction Motions in Civil Cases: Tolling Time of Appeal" is RESCINDED (but may be used for informational purposes only).
- Policy Directive 80-007 (Revised), dated August 12, 1980, "Landlord/Tenant; Appeal Procedure" is RESCINDED.
- Policy Directive 80-007 (Supplement), dated October 21, 1982, "Landlord/Tenant; Appeal Procedure" is RESCINDED.
- Policy Directive 80-007 (2nd Supplement), dated April 25, 1984, "Landlord/Tenant; Appeal Procedure" is RESCINDED.
- Policy Directive 80-007 (3rd Supplement), dated July 13, 1984,

"Landlord/Tenant; Appeal Procedure" is RESCINDED.

- Policy Directive 80-007 (4th Supplement), dated February 7, 1985, "Landlord/Tenant; Appeal Procedure" is RESCINDED.

- Policy Directive 80-007 (5th Supplement), dated July 16, 1985, "Landlord/Tenant; Appeal Procedure" remains in effect for informational purposes only.

- Policy Directive 81-32, dated January 9, 1987, "An Indigent's Right to Appeal in Civil Cases" is RESCINDED (but may be used for informational purposes only).

- Policy Directive 94-147, dated October 3, 1994, "Appeal and Other Post-Judgment Procedures in Civil Cases: Litigant Information" remains in effect although much of the information within Policy Directive 94-147 is also contained within the attached material.

- Policy Directive 94-149, dated October 28, 1994, "Relief from Default Judgments or Non-Suits in Landlord/Tenant Cases" is RESCINDED (but may be used for informational purposes only).

**Highlights of the attached Justice of the Peace Court appellate chapter for the Delaware Appellate Handbook are as follows:**

RIGHT TO APPEAL AND FILING REQUIREMENTS FOR CIVIL DEBT, TRESPASS AND REPLEVIN APPEALS (Sections 24.02a, b and c(2)) - Procedures on how and when to file an appeal in the Court of Common Pleas are outlined in these sections. See pages 24-1 through 24-3.

APPEAL REQUIREMENTS FOR CIVIL DEBT, TRESPASS AND REPLEVIN (Section 24.02c) - If improper notification of the time of an appeal is provided by the Court to the parties and the applicants are *pro se* and rely in good faith on the reasonable instructions of the court, appellate courts have generally refused to dismiss an appeal for failure to timely file. See page 24-2 and 24-3.

EFFECT OF POST JUDGMENT MOTIONS IN TOLLING APPEAL TIME (Section 24.02f) - Seasonably made motions brought under J.P. Court Civil Rule 20(c)(d) or (e) toll the time period within which an appeal must be made while motions filed pursuant to J.P. Court Civil Rule 20(b) or a motion to vacate a default judgment do not toll the time for appeal. See pages 24-5 and 24-6.

PROHIBITION OF APPEARANCE OF JUSTICE OF THE PEACE ON APPEAL (24.02g and 24.04g) - Justices of the Peace are precluded from appearing as a witness in the Court of Common Pleas from a case on appeal from the Justice of the Peace's decision below. See pages 24-6 and 24-14.

RIGHT TO APPEAL AND FILING REQUIREMENTS FOR LANDLORD/TENANT APPEALS (Section 24.03c) - Procedures on how and when to file an appeal of a Landlord/Tenant summary possession action to a three Judge panel are outlined in these sections. See page 24-8.

SCOPE OF REVIEW IN LANDLORD/TENANT APPEALS (Section 24.03d) - Landlord/Tenant summary possession actions may be appealed to a three Judge panel of Justices of the Peace and not to the Court of Common Pleas. Relief from default or non-suit judgments must be heard by a Justice of the Peace for a decision on the motion. If the motion is denied by the Justice of the Peace, the appeal of the denial is to the Court of Common Pleas. If the default or non-suit judgment is vacated by the Justice of the Peace hearing the motion, the case is considered on its merits and an appeal of the decision on the merits goes to the three Judge panel. See pages 24-8 through 24-10.

RIGHT TO APPEAL AND FILING REQUIREMENTS FOR CRIMINAL AND TRAFFIC CASES (Sections 24.04a through c) - Procedures on how and when to file a criminal or traffic appeal are outlined in these sections. See pages 24-10 through 24-12.

APPEAL THRESHOLD (Section 24.04e) - The appeal threshold based upon a fine ordered in a traffic case or a Title 11 case does not include the court costs or amounts the Defendant must pay to the Victim Compensation Fund. The appeal threshold for incarceration does not include a term of incarceration which is suspended for probation or a sentence of probation. See pages 24-12 and 24-13.

APPEALS OF VIOLATIONS OF COUNTY AND MUNICIPAL ORDINANCES (Section 24.04h) - Appeals of violations of county or municipality ordinances or codes may be appealed to the Court of Common Pleas regardless of the amount of the fine imposed. See page 24-14.

EXTRAORDINARY WRITS (WRIT OF CERTIORARI, PROHIBITION AND MANDAMUS (Section 24.05)) - Brief explanations of the use of extraordinary writs as an alternative to normal appeal are included in these sections. See pages 24-14 through 24-16.

PWG/crm  
Attachment

cc: The Honorable E. Norman Veasey  
The Honorable Randy J. Holland  
The Honorable Henry duPont Ridgely  
The Honorable Arthur F. DiSabatino  
The Honorable Vincent J. Poppiti  
The Honorable Alfred R. Fraczkowski  
Keith R. Brady, D.A.G.  
Thomas W. Nagle  
Anna A. Lewis  
John Betts  
Law Libraries: New Castle County, Kent County, Sussex County,  
Widener University School of Law  
Digilaw, Inc.

## CHAPTER 24. JUSTICE OF THE PEACE COURT APPEALS

Patricia W. Griffin\*

24.01      INTRODUCTION.      This chapter describes procedures for appeals in civil, traffic and criminal cases from the Justice of the Peace Courts. These Courts have an extremely heavy caseload. In fiscal year 1994, over 285,000 criminal and traffic and 31,000 civil cases were filed in the Courts of the Justices of the Peace. Since the earlier version of this handbook, jurisdiction of appeals from the Justice of the Peace Courts was transferred by statute from the Superior Court to the Court of Common Pleas. For guidance in practicing before a Justice of the Peace, the reader is referred to the Chief Magistrate's Legal Memoranda and Police Directives to the Justices of the Peace which are on file in law libraries of each county, and available under "JP" on the Digilaw computer-based research system. With regard to traffic cases, one of the most serious offenses which the Justices of the Peace have jurisdiction to hear, try and finally determine is the offense of driving while under the influence of intoxicating liquor in violation of 21 *Del. C.* § 4177(a). In 1994, the Justices of the Peace disposed of almost 4,800 such cases.

24.02      CIVIL DEBT, TRESPASS AND REPLEVIN ACTIONS.  
Justice of the Peace Courts have jurisdiction to hear, try and finally determine actions in debt, trespass (excluding personal injury actions) and replevin where the amount in controversy does not exceed \$15,000. 10 *Del. C.* §§ 9301, 9303, 9304.

a.      Right of Appeal. A party to a civil action in debt, trespass or replevin that originates in and proceeds to judgment in a Justice of the Peace Court has a right of appeal to the Court of Common Pleas for a trial de novo where the judgment exceeds five dollars, exclusive of costs, or where either the plaintiff's demand or the defendant's counterclaim, exceeds five dollars, and is disallowed. 10 *Del. C.* §§ 9570, 9614, 9640. Justices of the Peace, immediately after passing judgment in all civil cases, are required by law to advise the party litigants of their right to take an appeal from the decision and must inform them of the time and

---

\*The Honorable Patricia Griffin is Chief Magistrate for the State of Delaware. The Honorable Norman A. Barron should also be recognized for his work on the earlier version of this chapter, which was completed while he served as Chief Magistrate of the State of Delaware.

manner in which the appeal may be taken. The law further requires that the records of the Justice of the Peace contain an entry indicating the information given by the Justice of the Peace. 10 *Del. C.* § 9505. Justice of the Peace civil Form No. 14A, containing information on post judgment procedures, is provided to the parties with each written judgment order.

b. Taking an Appeal. A civil appeal to the Court of Common Pleas from a final judgment or order in a Justice of the Peace Court debt, trespass or replevin action is taken by the timely filing of a notice of appeal with the clerk of the Court of Common Pleas in the county in which the judgment was rendered by the Justice of the Peace Court. The Court of Common Pleas is responsible for establishing appeal procedures and supersedeas bond requirements by rule. 10 *Del. C.* § 9571(d).

c. Appeal Requirements.

(1) Time Requirements. Immediately upon the entry of an order or judgment, the clerk of the Justice of the Peace Court is required to serve by mail upon every party affected thereby a notice of the entry of judgment and the time and manner of appeal and to make a notice of the mailing in the case docket. J.P.Ct.Civ.R. 19(j). A party entitled to an appeal from a Justice of the Peace Court final judgment or order in a civil action must file a notice of appeal with the Court of Common Pleas in the county in which the judgment was rendered within fifteen days from the date of the judgment, starting the day after the judgment was ordered. 10 *Del. C.* § 9571(a) and Ct.Com.Pls.Civ.R. 72.3(a). If the last day of the appeal period falls on a Saturday, Sunday or legal holiday, then the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. J.P.Ct.Civ.R. 8(a).

If improper notification of the time, manner and right to an appeal is provided by the court to the parties and the appellants are pro se and rely in good faith on the reasonable instructions of the court, appellate courts have generally refused to dismiss an appeal for failure to timely file. *Rhonda Couch (Bechtel) v. Neil Dunn*, Del. Supr., No. 163, 1995, at 6 (August 10, 1995) (ORDER); *Catts v. Al-Arnasi*, Del. Super., No. 89C-SE18, Lee, J. (February 12, 1990), citing *Petrucelli v. McFarland*, Del. Super., C.A. No. 88C-AP-138, Taylor, J. (March 20, 1989) (ORDER), reargument denied, Taylor, J. (April 11, 1989), appeal refused, Del. Supr., No. 192, 1989, Christie, J. (June 5, 1989)

(ORDER) (also cited as decision without published opinion at 561 A.2d 117 (1971)); *Harrison v. Simon*, Del. Super., C.A. No. 83C-SE15, Poppiti, J. (March 18, 1985) (ORDER). However, this policy does not apply in cases in which the appellant has legal representation. *Lenape Associates v. Callahan*, Del. Supr., No. 171, 1992, Moore, J. (October 26, 1992) (ORDER); *Freedman and Sutton v. Burton and Aronoff*, Del. Super., C.A. No. 94C-05-041, Lee, J. (August 25, 1994); *Catts, supra*, at 3-4.

(2) Filing Requirements. Within fifteen days from the date of judgment, the notice of appeal (form available from the Clerk's Office of the Court of Common Pleas), including an original and one copy, must be filed with the Court of Common Pleas. If the plaintiff is filing the appeal, the following documents must be filed within the fifteen day appeal period: (1) original complaint plus one copy for each party to be served; (2) original praecipe (form available from the Clerk's Office of the Court of Common Pleas) plus one copy; and (3) original Summons on Appeal (form available from the Clerk's Office of the Court of Common Pleas) plus one copy for each party to be served. If the defendant is filing the appeal, there is an additional ten day period after the notice of appeal is filed to provide the Court with the (1) original praecipe (form available from the Clerk's Office of the Court of Common Pleas) plus one copy; and (2) original Summons on Appeal (form available from the Clerk's Office of the Court of Common Pleas) plus one copy for each party to be served. Ct.Com.Pls.Civ.R. 72.3(a) and Court of Common Pleas' Instructions for Filing an Appeal.

Either party has an additional ten day period after the notice of appeal is filed to provide the Court of Common Pleas with an original certified copy of the transcript from the Justice of the Peace Court, plus a copy for each party to be served, the non-refundable \$125 filing fee, as well as the fee for service. Ct.Com.Pls.Civ.R. 72.3(b).

If all of the required documents are not filed in a timely manner with the Court of Common Pleas, the appeal may be dismissed by the Court.

(3) Proper Identification of Parties. For the Court of Common Pleas to have jurisdiction of an appeal *de novo* from the Justice of the Peace Courts, the parties below and on appeal must be identical in name, number and character or right in which they sue or are sued. *Cf. Vailati v. Berman, et al.*,



Del. Super., C.A. No. 89C-NO24, Graves, J. (June 28, 1991), citing *Wilson v. Eastern Electric Heating, Inc.*, Del. Supr., No. 209, 1987, Walsh, J. (October 4, 1988) (ORDER). The substitution of different parties or inclusion of additional parties on appeal deprive the appellate court of jurisdiction. *Vailati, supra*, and *Panzer Management Co. v. Farrall*, Del. Super., C.A. No. 85C-DE-5, O'Hara, J. (March 3, 1987). Further, the "right of appeal extends only to a retrial of the same cause of action that was heard and decided [in the Justice of the Peace Court]. " *Wilson v. Eastern Electric & Heating, Inc., supra*, citing *Gaster v. Belak*, Del. Super., 318 A.2d 628 (1974).

d. Stay of execution. There shall be no stay of execution or other proceedings below unless ordered by the Court of Common Pleas pursuant to Ct.Com.Pls.Civ.R. 62(c). To stop execution on a judgment during the appeal proceedings, the appellant must file a motion with the Court of Common Pleas, which usually must be accompanied by a supersedeas bond or cash deposit sufficient to pay the amount of the judgment appealed from plus interest and court costs. *Id.* [The bond requirement is waivable for those truly unable to pay. *See Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898, 911 (3rd Cir. 1980).] The judgment will be stayed if the motion and the supersedeas bond or cash deposit are filed.

e. Appeal Procedures. After all the required documents have been served on the other party:

- if the plaintiff filed the appeal, the defendant will have 20 days in which to answer the complaint in writing; upon receipt of the defendant's timely response, the Court will set the date for a pre-trial conference or trial on the matter.

- if the defendant filed the appeal, the plaintiff will have 20 days in which to file the complaint with the Court and serve a copy on the defendant; upon the defendant's receipt of the complaint, he or she will have 20 days in which to file an answer; when both the complaint and answer are filed, the Court will set the date for a pre-trial conference or trial on the matter.

f. Effect of Post-Judgment Motions in a Justice of the Peace Court on Civil Appeals.

Seasonably made motions for new trial and motions to alter or amend judgment brought under J.P.Ct.Civ.R. 20(c), (d) or (e) toll the time period within which an appeal must be made. Because a judgment is not final while a J.P.Ct.Civ.R. 20(c), (d) or (e) motion is pending, the time for appeal is suspended upon the filing of such a post-judgment motion. *Trowell v. Diamond Supply Co.*, Del. Supr., 91 A.2d 979, 799 and 801 (1952); *Hessler, Inc. v. Farrell*, Del. Supr., 260 A.2d 701, 702 (1969); *Long v. Lee*, Del. Super., 168 A.2d 536, 538 (1960). For the time period to be tolled, however, the J.P.Ct.Civ.R. 20(c), (d) or (e) motion must be made within ten days after judgment. Further, if relief pursuant to the seasonably made motion is denied, the 15 day appeal period resumes running the day immediately following the date of the denial.

Unlike the motions discussed above, the finality of the underlying substantive decision is not affected by a J.P.Ct.Civ.R. 20(b) motion or a motion to vacate a default judgement unless relief from the original judgment is actually ordered. *Sleek v. J.C. Penney Co.*, 256 A.2d 292, 258 (3d Cir. 1961) (discussing Fed.R.Civ.Pro 60(b) (which is analogous to J.P.Ct.Civ.R. 20(b)), and the effect of motion to vacate a default judgment based upon excusable neglect). Furthermore, Rule 20(b) expressly states that a motion based upon mistake, inadvertence, excusable neglect, fraud or similar grounds does "not effect the finality of a judgment or suspend its operation." Since the substantive judgment's finality remains intact (along with its susceptibility to appeal) even after a J.P.Ct.Civ.R. 20(b) motion has been filed, there is no reason to toll the time within which an appeal of that judgment must be made.

Similarly, a motion to vacate a default judgment brought under 10 Del. C. §9538 does not effect the original judgment's finality. *Werb v. D'Allessandro*, Del. Supr., 606 A.2d 117, 119 (1992) citing *Ney v. Polite*, Del. Supr., 399 A.2d 527, 529 (1979). *Ney v. Polite* is cited by the courts as authority for holding that a default judgment is a final, appealable decision and that an appeal upon a denial of a motion to vacate will only review that denial (never the original judgment). *Kenyon v. Setting*, Del. Super., No. 91C-10-217, Taylor, J. (February 20, 1992); See also *Werb v. D'Allessandro*, Del. Supr., 606 A.2d 117 (1992); *Matt Slap Subaru v. Podolecki*, Del. Super., No. 89C-FE-203-1-CV, Bifferato, J. (June 8, 1989).

In general, a default judgment is a final judgment for all purposes including appeal. *Werb*, 606 A.2d at 119; 6 J. Moore, Moore's Federal Practice ¶55.09 (2d ed. 1994). Because a motion to vacate seeks relief from a *final* judgment, it does not alter finality of that judgment, nor does it toll the time for appeal. The finality of the original judgment is only affected if it is actually vacated, opening up the judgment for rehearing and removing the possibility of appeal since the judgment no longer survives. *Sleek*, at 528; 10 *Del. C.* § 9538. Additionally, a default judgment is customarily vacated based upon excusable negligence, which is a proper ground for granting a motion brought under rule 20(b) (which does not toll the time for appeal). *See Sleek*, at 258. Because a motion to vacate a default judgment (like a 20(b) motion) does not alter the finality of the original decision unless it is granted, the fifteen day time period within which an appeal of that judgment is not tolled. As a consequence, it is likely that the right to appeal the original default judgment will be lost if a party chooses to file a motion to vacate the default judgment (since the 15 days will continue to run). However, a party has 15 days from the denial of a motion brought under 10 *Del. C.* § 9538 or J.P.Ct.Civ.R. 20(b) to appeal that denial because such a denial possesses all of the attributes of finality. *Ney*, at 529; *Werb*, at 119.

g. Prohibition of Appearance of Justice of the Peace on Appeal. The Justice of the Peace who heard the case below is precluded from appearing or being compelled to appear as a witness in the Court of Common Pleas for a case on appeal from that Judge's decision below. *Evans v. Justice of the Peace Court 19*, Del. Supr., No. 215, 1994, Holland, J. (January 30, 1994), citing *Brooks v. Johnson*, Del. Supr., 560 A.2d 1001, 1002 (1989). The Court based its conclusion on the United States Supreme Court's holding in *U.S. v. Morgan*, 313 U.S. 409, 422 (1941) (citing *Fayerweather v. Ritch*, 195 U.S. 276 (1904)), that "the examination of a judge's mental process would be destructive of judicial responsibility and undermine the integrity of the judicial process."

24.03 LANDLORD/TENANT CASES. Justices of the Peace have jurisdiction to hear, try and finally determine matters arising under the Landlord/Tenant code. The usual landlord/tenant action heard before a Justice of the Peace is a summary proceeding for possession of premises filed pursuant to Chapter 57 of Title 25. The Justice of the Peace Court which is closest to the leased premises and in the same county has jurisdiction to entertain such actions. 25 *Del. C.* § 5701. These proceedings may include demands for back rent and other charges enumerated in the Landlord/Tenant Code. *Stoltz Management v.*

other charges enumerated in the Landlord/Tenant Code. *Stoltz Management v. Consumer Affairs Board*, Del. Supr., 616 A.2d 1205, 1209 (1992) (listing landlord's monetary entitlements, consisting of agreed-upon rent, late rent charge, separate charge for utilities, security deposit, and reimbursement for certain "repairs, maintenance tasks, alterations or remodeling", for the cost of remedying breaches of contracts, cost of waste and failure to report defective conditions, harm resulting from tenant's extended absence or early termination, and cost of summary possession and removal and storage of tenant's property). 25 Del. C. § 5707(5). The Justice of the Peace court has jurisdiction to hear, try and finally determine the back rent and specified other issues where the amount demanded does not exceed the Court's jurisdictional limit of \$15,000. 10 Del. C. § 9301.

a. Right of Appeal. There is no right to an appeal to the Court of Common Pleas for a trial de novo from a Justice of the Peace Court summary proceeding for possession. *Bomba's Restaurant and Cocktail Lounge, Inc. v. Lord De La Warr Hotel, Inc.*, Del. Supr., 389 A.2d 766 (1978). Instead, a party aggrieved by the judgment rendered in such a proceeding may request a trial de novo before a special court comprised of three Justices of the Peace other than the Justice of the Peace who heard the case originally. 25 Del. C. § 5717. A party to a summary proceeding for possession has a right to a trial by jury in a Justice of the Peace Court. 25 Del. C. § 5713; *Hopkins v. Justice of the Peace Court No. 1*, Del. Super., 342 A.2d 243 (1975). Where the original proceeding was tried before a jury, a party aggrieved by the judgment rendered in such a proceeding may request an appeal on the record before a special court comprised of three Justices of the Peace who will review the tape recording of the proceeding below to determine if errors of law occurred. *McMakin v. Justice of the Peace Court No. 14 and Levenberg*, Del. Super., C.A. No. 81M-NO-1, Bifferato, J. (Oct. 18, 1982). The decision on the record shall be by majority vote. 25 Del. C. § 5707(b).

b. Taking an Appeal. An appeal from a Justice of the Peace Court summary proceeding for possession to a special three judge court consisting of three other Justices of the Peace is taken by (1) timely filing a written notice of appeal with the Justice of the Peace Court and (2), so as to stay proceedings on the judgment, executing and filing with the Court an undertaking to the successful party, with such bond or other assurances as may be required by the Court, to the effect that the aggrieved party shall pay all costs which may be awarded against him and pay all damages, including rent justly accruing during the pendency of the

appeal. 25 Del. C. § 5717(b). Once an appeal has been perfected, the special court shall hear the appeal within ten days from the filing thereof. 25 Del. C. § 5717(a).

c. Appeal Requirements. A party wishing to appeal from a summary proceeding for possession must file a written notice of appeal with the Justice of the Peace Court out of which the judgment was rendered within five days after judgment, starting the day after the judgment was ordered. J.P. Civ. Form 32 is the form of notice prescribed by the Justice of the Peace Court. In compliance with 25 Del. C. § 5717(b), J.P. Civ. Form 32 also sets forth the undertaking to the successful party, with such bond or other assurances as may be required by the Court, to the effect that the aggrieved party will pay all costs of such proceedings which may be awarded against him and abide the order of the Court therein, and pay all damages, including rent justly accruing during the pendency of such proceedings. When the form containing the execution is filed with the Court, whether or not bond is required, all further proceedings in execution of the trial court judgment are stayed. 25 Del. C. § 5717(b). The parties must be properly identified and identical to the parties in the Justice of the Peace Court. See § 24.02(c)(3), *supra*.

d. Scope of Review. An appeal to the three judge panel of Justices of the Peace taken pursuant to § 5717 may include any issue on which judgment was rendered at the trial court level, including the issue of back rent due, any other statute to the contrary notwithstanding. 25 Del. C. § 5717(c). The Supreme Court recognized that no appeal may be taken to the Superior Court (which was then the appellate court for Justice of the Peace Court cases) in summary possession actions. *Capano Investments v. Levenberg*, Del. Supr., 564 A.2d 1130 (1989). However, the Superior Court has held that the proper avenue for relief from denial of a Rule 20(b) motion or of a motion to vacate a default or nonsuit judgment in a summary possession landlord/tenant case is an appeal to the Court of Common Pleas. *Gibson v. North Delaware Realty Co.*, Del. Super., 95A-08-011-JOH, Herlihy, J. (June 6, 1996); *Miles v. Justice of the Peace Court #13*, Del. Super., C.A. No. 93A-02-12, Del Pesco, J. (November 3, 1993)(ORDER).

In *Miles*, Wilmington Housing Authority ("WHA") filed a summary possession proceeding in J.P. Court No. 13 against Miles for failure to pay rent. A nonsuit was entered in favor of Miles when WHA failed to appear for trial. WHA then requested that the matter be set for trial and the Court referred the matter for a trial de novo before a three judge panel pursuant to 25 Del. C. § 5717. A default judgment was entered against Miles when she failed to appear for trial.

Miles filed for relief from the default judgment along with a counterclaim and the matter was referred for a trial de novo before a three judge panel. The three judge panel ruled for WHA on its possession claim and against Miles on her counterclaim. Miles filed a writ of certiorari alleging that the J.P. Court exceeded its jurisdiction in allowing the appeal of the nonsuit to the three judge panel pursuant to 25 Del. C. § 5717(a).

The Superior Court determined that, based upon 10 Del. C. § 9539, a nonsuit should be handled in the same manner as a default judgment and that the procedures for providing relief from default judgments are contained in Justice of the Peace Court Civil Rule 20(b) and 10 Del. C. § 9538. The Court found that both Rule 20(b) and section 9538 establish procedures for vacating a judgment "which require a movant to show that he or she was not wilfully negligent or neglectful" and that "[n]either section provides for a trial de novo before a three judge panel." *Id.* at 5. Accordingly, the Court held that requests for relief from default judgments or nonsuits in summary possession landlord/tenant cases should be directed to a Justice of the Peace, who will conduct a hearing and, upon determining that the party requesting relief was not wilfully negligent in letting judgment go against them, vacate the nonsuit or default judgment. If the nonsuit or default judgment is vacated, the Justice of the Peace (or jury, if a jury trial is requested by the party) would consider the merits of the case and make a determination, which would be subject to an appeal to the three judge panel. *Id.* at 6. If the request for relief from a nonsuit or default judgment is denied, then the proper method for relief from the denial would be an appeal to Superior Court (or presently the Court of Common Pleas).

The Superior Court in *Gibson* broadly applied the *Miles* findings to hold that the proper avenue for relief from the denial of a motion under J.P. Civil Rule 20(b) to vacate a judgment after trial (not a default or nonsuit judgment) in a summary possession landlord/tenant case is an appeal to the Court of Common Pleas. *Gibson*, Mem. Op. at 5. In *Gibson*, the defendant-tenant did not appeal to the three judge panel within five days of the judgment after trial. Sixteen days after the judgment, the defendant/tenant filed a motion under Rule 20(b), which was denied by the Justice of the Peace Court. The defendant/tenant then filed a timely appeal of the denial with the Court of Common Pleas, arguing that the appeal procedures set forth in 10 Del. C. § 9572, rather than those in 25 Del. C. § 5717, controlled. The Court of Common Pleas dismissed the appeal and denied the defendant/tenant's application to transfer the appeal to a three judge panel, holding that the underlying summary

possession action required appeal to the three judge panel and that the defendant/tenant had failed to file the appeal in a timely manner. *Gibson v. North Delaware Realty Co.*, Del. Ct. Com. Pls., C.A. #1995-06-11, DiSabatino, C.J. (June 20, 1995). The Superior Court reversed the decision of the Court of Common Pleas regarding dismissal and transfer of the appeal, and determined that the defendant/tenant's initial appeal of the denial was properly and timely taken. *Gibson*, C.A. No. 95-08-011-JOH, Mem. Op. at 5. Thus, the Superior Court held that the proper method for relief from a denial of a Rule 20(b) motion to vacate a judgment after trial is an appeal to the Court of Common Pleas and not to the three judge panel.

In summary, the process for requesting relief from a judgment is to direct a motion to vacate a judgment to an individual Justice of the Peace, who conducts a hearing and either vacates the judgment or denies the motion. If the judgment at issue is a nonsuit or default judgment, the Justice of the Peace applies the "wilfully negligent" standard set forth in 10 Del. C. § 9538 in determining whether to grant or deny the motion. If the judgment is vacated, the Justice of the Peace then considers the merits of the case and makes a determination, which is subject to an appeal to the three judge panel. If the request for relief is denied, then the proper method of relief from the denial is an appeal to the Court of Common Pleas.

24.04      TRAFFIC AND CRIMINAL CASES.      Generally speaking, Justices of the Peace have jurisdiction to hear, try and finally determine all Title 21 traffic offenses committed with the State. 21 Del. C. § 703. They have jurisdiction to hear, try and finally determine all Title 11 criminal code violations. 11 Del. C. § 2701. They also have jurisdiction to hear, try and finally determine all criminal misdemeanors which are listed under 11 Del. C. § 2702.

a.      Right of Appeal.

(1)      In Traffic cases. The right to appeal from a Justice of the Peace Court traffic conviction to the Court of Common Pleas for a trial de novo exists when the conviction occurs and the sentence includes any period of incarceration, or the fine exceeds \$100. 21 Del. C. § 708(b). All Justices of the Peace, immediately after passing final judgment in all traffic cases, are required by law to advise the defendant of the right to take an appeal from the decision and must inform the

defendant of the time and manner in which the appeal may be taken. The law further requires that the records of the Justice of the Peace contain an entry indicating the information given by the Justice. 10 *Del. C.* § 9505. The standard sentencing order contains such an entry.

(2) In Criminal cases. Appeals from Justice of the Peace Court title 11 criminal cases are permitted when, after trial and conviction, the sentence is incarceration exceeding one month, or a fine which exceeds \$100. Del. Const. Art. IV, § 28. A sentence of 30 days imprisonment is a sentence of one month. *Marker v. State*, Del. Supr., 450 A.2d 397 (1982); *see also Joseph Walls v. State of Delaware*, Del. Super., Cr.A. No. N-86-08-1104-A and N-86-08-1105-A, Poppiti, J. (August 25, 1988) (ORDER), at 2. All Justices of the Peace, immediately after passing final judgment in all criminal cases, are required by law to advise the defendant of his right to take an appeal from the decision and must inform the defendant of the time and manner in which the appeal may be taken. The law further requires that the records of the Justices of the Peace contain an entry indicating the information given by the Justice of the Peace. 10 *Del. C.* § 9505. The standard sentencing order contains such an entry.

b. Taking an Appeal. Appeals from Justice of the Peace Court traffic or criminal cases to the Court of Common Pleas are taken by (1) timely giving notice of appeal with the Justice of the Peace Court and (2) giving bond with surety satisfactory to the Justice of the Peace Court in which the offender was convicted. 21 *Del. C.* § 708(b); Ct.Com.Pls.Crim.R. 39(b).

c. Appeal Requirements. A defendant wishing to appeal must inform the Justice of the Peace Court out of which the judgment was rendered of his or her intention to appeal, within fifteen days from the date of sentencing (not counting the date of the sentence), unless otherwise provided by statute. Ct.Com.Pls.Crim. R. 39(a). If the last day of the period falls on a Saturday or Sunday or legal holiday (as provided by statute or designated by the Governor or the Chief Justice of the State of Delaware), then the period shall run until the end of the next day on which the Clerk's office is open. The \$75 fee for taking the appeal to the Court of Common Pleas will be collected by the Justice of the Peace Court and transferred to the Court of Common Pleas with the appeal documents.

When an appeal is taken, the Justice of the Peace Court shall forthwith transmit the appeal bond, appeal fee, and a certified transcript of the record to the



Clerk of the Court of Common Pleas shall not enter an appeal de novo until the appeal bond and certified transcript of the record is filed with the Clerk's office. Ct.Com.Pls.Crim.R. 39(b).

d. Appeal Bond.

(1) In Traffic cases. The defendant must give bond with surety satisfactory to the Justice of the Peace within the fifteen day appeal period. 21 *Del. C.* § 708(b). The amount of the bond and type of surety are determinations to be made by the Justice of the Peace utilizing sound judicial discretion. In the usual traffic case, the Justice of the Peace will set bond in the amount of the fine plus court costs and the Victim's Compensation Fund assessment. The bond may either be secured or unsecured in the Justice of the Peace's discretion. A traffic offender who proves his or her indigency to the satisfaction of the court shall be allowed an unsecured appeal bond.

(2) In Criminal cases. Pursuant to Ct.Com.Pls.Crim.R. 39, Justices of the Peace shall require the defendant who files an appeal from a Justice of the Peace Court Title 11 criminal case to give bond with surety satisfactory to the Justice of the Peace before whom the defendant was convicted. In determining the amount thereof, the Justice of the Peace is to be guided by J.P.Ct.Crim.R. 28, Chapter 21 of Title 11, and the Constitutions of the United States and the State of Delaware. A criminal defendant who proves his or her indigency to the satisfaction of the court shall be allowed an unsecured appeal bond.

(3) Stay of Proceedings. An appeal of a criminal or traffic conviction which is timely filed and in which the required bond and surety is given operates as a stay of the Justice of the Peace Court judgment and proceedings. 21 *Del. C.* § 708(b) and Ct.Com.Pls.Crim.R. 39(d). The decision of the Justice of the Peace as to bond and surety may be reviewed by a Court of Common Pleas judge. *Id.*

e. The Appeal Threshold. As previously stated, an appeal to the Court of Common Pleas for a trial de novo from a Justice of the Peace Court traffic conviction is allowed when the sentence includes any period of incarceration, or the fine exceeds \$100, and from a criminal conviction when the sentence is incarceration exceeding one month or a fine which exceeds \$100.

With regard to the fine appeal threshold, the fine does not include costs or the Victim's Compensation Fund assessment. Thus, a person who is fined in the amount of \$90, plus court costs of \$30, plus 18% of the amount of the fine for the Victim's Compensation Fund, 11 *Del. C.* § 9012(a), for a total of \$136.20, has no right to appeal to the Court of Common Pleas for a trial de novo from a Justice of the Peace court conviction after trial on a Title 21 traffic or Title 11 criminal offense. *Brookens v. State*, Del. Supr., 466 A.2d 1218, 1219 (1983). If a defendant is fined \$150, with \$75 of the fine suspended unconditionally, the appeal threshold is also not met. *Ternahan v. State*, Del. Super., Cr.A. No. 89-09-0000A, Graves, J. (November 21, 1990). The Court in *Ternahan* stated that "there is no possibility of any conduct by the defendant which could trigger payment of the suspended portion" so that Superior Court (now the Court of Common Pleas) has no jurisdiction over an appeal. *Id.* at 2. If a defendant is fined \$125 for three offenses, the fine amounts are not aggregated. *Id.* at 3; *Goldstein v. City of Wilmington*, Del. Super., C.A. No. 89A-AP-13, Gebelein, J. (March 20, 1991) at 8, *aff'd* 598 A.2d 149 (1991).

With regard to the appeal threshold for a sentence of incarceration, a term of incarceration suspended for a period of probation or a sentence of probation does not satisfy the appeal threshold. In *Sack v. State*, Del. Supr., No. 46, 1986 (March 31, 1986) (ORDER), the defendant had been sentenced to two years probation. The Court held that it had no jurisdiction over the appeal since "'imprisonment' means to be put in or as if in prison [citing *Marker, supra*]" and the sentences imposed on the defendant "do not require any term of imprisonment", and "probation is defined as 'sentencing without imprisonment of an offender'", citing 11 *Del. C.* § 4302(13). *Id.* at 2. See also *Jewell v. State*, Del. Supr., No. 136, 1986 (June 5, 1986) (ORDER). Similarly, in *Harris v. State*, Del. Super., Nos. K04-05-0392AC thru 0393AC, Ridgely, P.J. (December 2, 1994) (ORDER), the defendant had been sentenced in the Court of Common Pleas to incarceration for a term of six months at Level V, suspended for a one year term of probation at Level II. President Judge Ridgely held that Superior Court was without jurisdiction to hear the appeal since the sentence imposed did not require any term of imprisonment, citing *Jewell, supra*.

f. Appeal Procedures. Upon entry of an appeal in a traffic case, the Clerk of the Court of Common Pleas is required to give notice in writing forthwith to the Attorney General. Ct.Com.Pls.Crim.R. 39(b). On receipt of such notice, the Attorney General is required to file promptly an information with the Clerk's office,

office, whereupon the proceeding will continue in accordance with the Rules of the Court of Common Pleas. *Id.*

g. Prohibition of Appearance of Justice of the Peace on Appeal. See § 24.02(g), *supra*.

h. County and Municipal Ordinances. Justices of the Peace have jurisdiction to hear, try and finally determine all violations of any ordinance, code or regulation of the governments of any County or municipality; however, any person convicted of such violations may be fined not more than \$1,000 for each violation. 11 *Del. C.* § 5917(a). Every defendant convicted, after trial, of such a violation shall have the right to appeal to the Court of Common Pleas for a trial de novo irrespective of the amount of the fine imposed. In other words, there is an automatic right to appeal such cases to the Court of Common Pleas. 11 *Del. C.* § 5917(b). [In contrast, 11 *Del. C.* § 5920 provides a monetary appeal threshold of \$100.00 from Justice of the Peace Court judgments "in a criminal action pursuant to [Title 11]." Violations of governmental ordinances, codes or regulations are not criminal actions pursuant to Title 11; in addition, a specific statutory section (11 *Del. C.* § 5917(b)) applies to appeals of county and municipal ordinance violations, thereby taking precedence over the more general statutory provisions of § 5920.] No such conviction or sentence shall be stayed pending appeal unless the person convicted shall give bond in an amount and with surety to be fixed by the Justice of the Peace before whom such person was convicted, at the time such appeal was taken. Such appeal shall be taken and bond given within five days from the time of conviction. 11 *Del. C.* § 5917(b). For purposes of interpreting § 5917(b), a conviction does not result until sentence has been imposed. Only then is the judgment final and, therefore, appealable. 4 *Am.Jur.2d*, Appeal and Error, § 161.

24.05 EXTRAORDINARY WRITS AS AN ALTERNATIVE TO NORMAL APPEAL. Several extraordinary appellate avenues are available to party litigants who appear before Justice of the Peace Courts on civil or criminal matters. These special petitions are all directed to the Superior Court which will grant relief only with caution and not in doubtful cases. *Knight v. Hale*, Del. Super., 176 A. 461 (1934). They fall, generally, into three underlying types of writs: certiorari, prohibition and mandamus. The Superior and Supreme Courts have the authority to issue these writs. 10 *Del. C.* §§ 142, 562, 564.

a. The Writ of Certiorari. This extraordinary writ is limited to jurisdictional and not factual review. *Kowal v. State*, Del. Super., 121 A.2d 675 (1956); *Woolley Practice*, §§ 899, 900, at 627. Briefly, "certiorari is a writ issued by a superior to an inferior court. . . requiring the latter to send to the former. . . the record and proceedings in some cause already terminated, to the end that the party who considers himself aggrieved by the determination of his rights by the inferior court. . . may have justice done him." *Woolley*, § 894, at 623. A certiorari proceeding differs fundamentally from an appeal in that the latter "brings the case up on its merits while the . . . [former] brings up the record only so that the reviewing court can merely look at the regularity of the proceedings." *Schwander v. Feeney's*, Del. Super., 29 A.2d 369 (1942). 4 C.J.S. Appeal and Error, § 17, at 93 (1957). Review of claims raised by a petition for a writ of certiorari is generally confined to jurisdictional matters, errors of law, or irregularity of proceedings which appear on the face of the record. *Matter of Butler*, Del. Supr., 609 A.2d 1080, 1081 (1992). Certiorari permits the reviewing court to determine the constitutionality of a statute under which a conviction was had in an inferior court, with no right of appeal, even if the constitutional issue was not presented in the lower court. *Shoemaker v. State*, Del. Supr., 375 A.2d 431 (1977); *Becker v. State*, Del. Super., 185 A. 92 (1936).

Although there is no time limit fixed by statute or court rule, it has been held that there is a 30 day period from the date of judgment for filing a praecipe for a writ of certiorari and the certified transcript of the record, to allow for the prompt entry of the recognizance and the issuance of the writ. *See Elcorta, Inc. v. Summitt Aviation, Inc.*, Del. Super., 528 A.2d 1199 (1987). The 30 day filing period is discretionary, not jurisdictional. *Id.* at 1201.

b. The Writ of Prohibition. This extraordinary writ should issue, as a preventative measure, where it is clear that a court has exceeded its jurisdiction or exercised powers beyond its authority. *Continental Coach Crafters Co. v. Fitzwater*, Del. Super., 415 A.2d 785 (1980); *Matushefske v. Herlihy*, Del. Supr., 214 A.2d 883 (1965). Thus, where a Justice of the Peace Court refused a tenant his right to a jury trial in a summary proceeding for possession of premises brought under Chapter 57 of Title 25, the Superior Court issued a writ of prohibition directed to that Justice of the Peace Court as the only remedy available to prevent the denial of trial by jury. *Hopkins v. Justice of the Peace Court No. 1*, Del. Super., 342 A.2d 243 (1975). A writ of prohibition may not usurp the

function of the writ of certiorari and can never be used to correct errors of law. *Continental Coach Crafters Co., supra.*

c. The Writ of Mandamus. The object and purpose of this extraordinary writ is to procure the performance of a duty by a public official or agency. *Milford 2nd Street Players v. Delaware Alcoholic Beverage Control Commission*, Del. Super., 552 A.2d 855, 856 (1988). The writ of mandamus can neither increase nor diminish the duty which the law prescribes; its function is not to create a duty but only to coerce the performance of a preexisting duty. *Capital Educators Ass'n v. Camper*, Del. Ch. 320 A.2d 782 (1974); *State ex rel. Cooke v. New York - Mexican Oil Co.*, Del. Super., 122 A. 55 (1923). Thus, mandamus is an appropriate remedy to compel a lower court to take jurisdiction in a case where it had erroneously declined jurisdiction. *Schagrin Gas Co. v. Evans*, Del. Supr. 418 A.2d 997 (1980). It will not issue unless the party seeking mandamus establishes a clear legal right to the relief requested. *Milford 2nd Street Players*, 552 A.2d at 856. Mandamus will not be awarded where there is other adequate legal remedy and may not be used as a substitute for appeal. *Id.*; *Williams v. Marvel*, Del. Supr., 158 A.2d 486 (1960); *Hastings v. Henry*, Del. Super., 40 A. 1125 (1894).



STATE OF DELAWARE  
JUSTICE OF THE PEACE COURTS

FAMILY COURT BUILDING  
22 THE CIRCLE, SUITE 120  
GEORGETOWN, DELAWARE 19947  
TELEPHONE: (302) 856 - 5871

820 N. FRENCH STREET  
11TH FLOOR  
WILMINGTON, DELAWARE 19801  
TELEPHONE: (302) 577 - 6001

PATRICIA WALTHER GRIFFIN  
CHIEF MAGISTRATE

**LEGAL MEMORANDUM 95-208 (REVISED)**

**TO: ALL JUSTICES OF THE PEACE  
ALL JUSTICE OF THE PEACE CLERKS**

**FROM: PATRICIA W. GRIFFIN  
CHIEF MAGISTRATE** *RWG*

**DATE: JUNE 11, 1996**

**RE: APPELLATE PROCEDURES IN THE JUSTICE OF THE PEACE  
COURT**

---

Attached is a copy of revised pages to the draft chapter on Justice of the Peace Court appellate procedures which I prepared for inclusion in an updated version of the Delaware Appellate Handbook. I understand that the Delaware Appellate Handbook should be published in the near future. The revised pages relate to the proper method of review in summary possession landlord/tenant cases. The decision of the Court of Common Pleas in *Gibson v. North Delaware Realty Company*, Del. Ct. Com. Pls., C.A. No. 1995-06-011, DiSabatino, C. J. ( June 20, 1995), has been reversed as it relates to the Court of Common Pleas' decision to dismiss the appeal of the denial of a motion to vacate a judgment after trial in a landlord/tenant summary possession action. The Superior Court also reversed the Court of Common Pleas' decision denying the transfer of the appeal to a three Judge panel since the appeal was not filed in a timely manner. Please review the attached pages

which contain a discussion of the Superior Court's holding in *Gibson*. (Please remove pages 24-8, 24-9 and 24-10 in the old version of the Legal Memorandum 95-208 and replace those pages with the attached new pages.)

If you have any questions, please do not hesitate to contact me.

PWG/crm

cc: Honorable E. Norman Veasey  
Honorable Randy J. Holland  
Honorable Henry duPont Ridgely  
Honorable Arthur F. DiSabatino  
Honorable Vincent J. Poppiti  
Honorable Alfred R. Fraczkowski  
Honorable Alicia Howard  
Keith R. Brady, D.A.G.  
Alderman's Courts  
Thomas W. Nagle  
Anna A. Lewis  
H. John Betts  
All Justice of the Peace Courts  
Law Libraries: New Castle County, Kent County, Sussex County,  
Widener University School of Law  
Digilaw, Inc.



STATE OF DELAWARE  
JUSTICE OF THE PEACE COURTS

FAMILY COURT BUILDING  
22 THE CIRCLE, SUITE 120  
GEORGETOWN, DELAWARE 19947  
TELEPHONE: (302) 856 - 5871

820 N. FRENCH STREET  
11TH FLOOR  
WILMINGTON, DELAWARE 19801  
TELEPHONE: (302) 577 - 6001

LEGAL MEMORANDUM

PATRICIA WALTHER GRIFFIN  
CHIEF MAGISTRATE

TO: ALL JUSTICES OF THE PEACE  
ALL JUSTICE OF THE PEACE CLERKS  
FROM: *Patricia W. Griffin*  
PATRICIA W. GRIFFIN  
CHIEF MAGISTRATE  
DATE: JUNE 24, 1996  
RE: APPELLATE PROCEDURES IN THE JUSTICE OF THE PEACE  
COURT

---

Attached is a copy of revised pages to the draft chapter on Justice of the Peace Court appellate procedures. (Please remove pages 24-10 and 24-13 in the old version of the Legal Memorandum 95-208 and replace those pages with the attached new pages.)

If you have any questions, please do not hesitate to contact me.

PWG/crm

cc: Honorable E. Norman Veasey  
Honorable Randy J. Holland  
Honorable Henry duPont Ridgely  
Honorable Arthur F. DiSabatino  
Honorable Vincent J. Poppiti  
Honorable Alfred R. Fraczkowski  
Honorable Alicia Howard  
Keith R. Brady, D.A.G.  
Alderman's Courts  
Thomas W. Nagle  
Anna A. Lewis  
H. John Betts  
All Justice of the Peace Courts  
Law Libraries: New Castle County, Kent County, Sussex County,  
Widener University School of Law  
Digilaw, Inc.





STATE OF DELAWARE  
JUSTICE OF THE PEACE COURT

5 E. PINE STREET  
GEORGETOWN, DELAWARE 19947  
TELEPHONE: (302) 856-5871  
FAX: (302) 856-5919

PATRICIA WALTHER GRIFFIN  
CHIEF MAGISTRATE

820 N. FRENCH STREET  
11TH FLOOR  
WILMINGTON, DELAWARE 19801  
TELEPHONE: (302) 577-8162

**LEGAL MEMORANDUM 95-208 (Second Supplement)**

**TO: ALL JUSTICES OF THE PEACE**  
**FROM: Patricia W. Griffin**  
**PATRICIA W. GRIFFIN**  
**CHIEF MAGISTRATE**  
**RE: APPELLATE PROCEDURES IN THE JUSTICE OF THE PEACE COURT**  
**DATE: SEPTEMBER 13, 2002**

---

**RESCINDING LEGAL MEMORANDUM 95-208 WITH REGARD TO APPEAL OF A SENTENCE OF INCARCERATION SUSPENDED FOR PROBATION (Third paragraph of 24.04(e) of Legal Memorandum 95-208)**

*Please cross out the third paragraph of § 24.04(e) which is located on page 24-13 of Legal Memorandum 95-208 and replace it with a reference to this supplement.*

*Legal Memorandum 95-208 is Chapter 23 of the Delaware Appellate Handbook, so the third paragraph of § 24.04(e) of that document is also revised.*

A recent Delaware Supreme Court case, *Weaver v. State*, 779 A. 2d 254 (Del. 2001), overruled prior caselaw<sup>1</sup> to find that a criminal sentence of incarceration exceeding one month, which is suspended entirely for probation, may be appealed. In so doing, the Court reasoned that, if a defendant is denied the right to appeal a sentence of imprisonment suspended entirely for probation at the time it is imposed, the time limitations on appeals would prevent the defendant from being able to appeal that sentence if the defendant were later found in violation of probation and ultimately sentenced to actual incarceration. The Court further found that the informal and summary nature of violation of probation hearings weighed in favor of granting defendants the right to appeal a criminal sentence exceeding one month of incarceration upon its imposition, even though the sentence is suspended in full for probation.

---

<sup>1</sup> See, e.g., *Jewell v. State*, 1986 WL 16959 (Del. Supr.).

The Court stated in pertinent part:

In Delaware, the benchmark of a "final judgment" in a criminal case is the pronouncement of sentence. The United States Supreme Court recognized long ago that an order imposing sentence upon a defendant is a final, appealable order even if the execution of the sentence is suspended for probation. Thus, in Delaware a defendant's time limit to file a direct appeal from a conviction and sentence begins to run on the date following the pronouncement of sentence, regardless of whether execution of the sentence is suspended for probation. If a level V sentence in excess of one month, which is suspended entirely for probation, is found to be unappealable because it fails to meet the jurisdictional threshold, then a defendant effectively has forever lost the right to appeal from an underlying conviction and sentence. Even if the defendant later is found in violation of probation (VOP) and ultimately is sentenced as a result of that VOP to serve actual incarceration well in excess of the constitutional threshold, the defendant will never have the opportunity to challenge directly the criminal conviction that forms the underlying basis of the jail sentence.

Such a result is fundamentally unfair in light of the lengthy prison sentences that may result from a VOP proceeding with its procedural informalities. A probationer has no absolute right to counsel at a VOP hearing or on appeal following a VOP adjudication. Furthermore, the trial court has broad authority to find a probation violation applying a preponderance of the evidence standard, in contrast to the standard of proof beyond a reasonable doubt required for the initial conviction. If the trial court finds the defendant has violated probation, it may terminate the defendant's probation and reimpose a prison term "at any time." Finally, upon finding a violation of probation, the Court may impose all or any portion of the sentence originally suspended.

Balancing the informal and summary nature of VOP proceedings against the potentially harsh prison sentences that may result, we conclude that the better policy is to afford a defendant the right to appeal a level V sentence upon its imposition, without regard to whether execution of the sentence is suspended for probation. Such a result is consistent with the policy that encourages construing statutes in favor of recognizing a right to appeal.

Although the Court, in *Weaver*, was addressing a criminal, rather than a traffic, sentence, it would appear that the same principal should apply in traffic cases. That principal is that if a sentence of incarceration is imposed which reaches the appeal threshold, an appeal should be permitted, even if the incarceration is suspended for probation. In traffic cases, an appeal is permitted if any period of incarceration is imposed. 21 *Del.C.* § 708. Therefore, following *Weaver*, in a Title 21 case, if any period of incarceration is imposed and suspended for probation, the sentence should be appealable.

**Thus, justices of the peace should advise defendants of their right to appeal if:**

- 1. In a criminal case, they are sentenced to more than 30 days at Level V, even if the Level V sentence is suspended in full for probation; and**
- 2. In a Title 21 case, they are sentenced to any period of incarceration at Level V, even if the Level V sentence is suspended in full for probation.**

PWG/crm

cc: Honorable E. Norman Veasey  
Honorable Joseph T. Walsh  
Honorable Henry duPont Ridgely  
Honorable Arthur F. DiSabatino  
Honorable Vincent J. Poppiti  
Honorable Alicia Howard  
Alderman's Courts  
Thomas W. Nagle  
Anna A. Lewis  
H. John Betts  
All Justice of the Peace Courts  
Law Libraries: New Castle County, Kent County, Sussex County,  
Widener University School of Law



STATE OF DELAWARE  
JUSTICE OF THE PEACE COURTS

FAMILY COURT BUILDING  
22 THE CIRCLE, SUITE 120  
GEORGETOWN, DELAWARE 19947  
TELEPHONE: (302) 856 - 5871

PATRICIA WALTHER GRIFFIN  
CHIEF MAGISTRATE

820 N. FRENCH STREET  
11TH FLOOR  
WILMINGTON, DELAWARE 19801  
TELEPHONE: (302) 577 - 8162

LEGAL MEMORANDUM 95-208 (1<sup>st</sup> Supplement)

TO: ALL JUSTICES OF THE PEACE  
FROM: *Patricia W. Griffin*  
PATRICIA W. GRIFFIN  
CHIEF MAGISTRATE  
DATE: APRIL 7, 1999  
RE: APPELLATE PROCEDURES IN THE JUSTICE OF THE  
PEACE COURT

---

In subsection (e) "The Appeal Thresholds" under 24.04, Traffic and Criminal Cases, in Legal Memorandum 95-208, it stated that an appeal to the Court of Common Pleas for a trial *de novo* from a Justice of the Peace Court traffic conviction is allowed when the sentence includes any period of incarceration or the fine exceeds \$100.00 and is allowed from a criminal conviction when the sentence is incarceration exceeding one month or the fine exceeds \$100.00. See pages 24-12 and 13.

With regard to the appeal threshold for a sentence of incarceration, a recent Delaware Supreme Court opinion further defines what constitutes "imprisonment" for purposes of allowing an appeal of a sentence. In *James R. Walt, Sr. v. State of Delaware*, Del. Supr., No. 80, 1998 (March 4, 1999), the Supreme Court held that sentencing a defendant to a Level IV halfway house constitutes "imprisonment" as that word is used in Article IV, Section 11(1)(b) of the Delaware Constitution. *Id.* at 9. In *Walt*, the defendant was found guilty of 10 counts of offensive touching, as a lesser-included offense of unlawful sexual contact in the second degree, and the

Superior Court sentenced Walt, for one of the convictions, to 30 days at Level V, with credit for time served, with the sentence suspended for three months at Level IV<sup>1</sup> home confinement, or Level IV halfway house, if no suitable residence for home confinement is found. Walt was ordered held at Level III until space is available at home confinement. Identical sentences were imposed for three of the additional offensive touching convictions. The Court also ordered 30 days at Level V, suspended for three months at Level III, for two of the other convictions and 30 days at Level V, suspended for three months at Level II, for the four remaining convictions.

Walt appealed his conviction to the Supreme Court and the State moved to dismiss the appeal on the grounds that the penalties imposed by the Superior Court failed to meet the Supreme Court's jurisdictional requirements. The Delaware Constitution, Article IV, Section 11(1)(b) provides that the Supreme Court may hear appeals from Superior Court "in criminal causes, upon application of the accused in all cases in which the sentence shall be death, imprisonment exceeding one month or a fine exceeding \$100.00, and in such other cases as shall be provided by law. . ." Walt argued that any of the sentences ordering 3 months served at a Level IV halfway house constitutes imprisonment exceeding one month.

The Court concluded that a sentence served in a Level IV halfway house constitutes "imprisonment" as it relates to the Supreme Court's appellate jurisdiction to hear appeals from the Superior Court in criminal proceedings. The Court stated:

A Level IV halfway house is not only officially denominated as quasi-incarceration, but also includes the following non-exclusive indicia of imprisonment: confinement; the ability to earn "good time credits" for release purposes; and designation as an "escapee" upon failure to return. Accordingly, because Walt was ordered to be imprisoned for three months in a halfway house, this Court has jurisdiction to hear his direct appeal from each of those sentences by the Superior Court.

---

<sup>1</sup> The Supreme Court stated that the various types of Level IV sentencing alternatives are: halfway houses, residential drug treatment programs, electronic home confinement and the live-out program.

The Court in *Walt* also looked at whether the Superior Court erred by considering Walt a perpetrator of domestic violence and, as a consequence, applied the higher SENTAC presumptive sentence related to domestic violence. The Court concluded that Walt, who was the anticipated step-grandfather to the victim (Walt's son had not yet married the child's mother) at the time of the offenses, was not a perpetrator of domestic violence as defined in 10 *Del.C.* § 901(9), the statutory definition of family. The Court, however, affirmed the Superior Court's sentence because the consideration of Walt as a perpetrator of domestic violence was only one of six factors the Superior Court specifically took into account in arriving at its sentencing plan for Walt. Thus, even though the Superior Court misconstrued the statute to include step-grandfather in the definition of family contained in 10 *Del.C.* § 901(9), that error was harmless beyond a reasonable doubt. (The Court ordered that any designation of Walt as a perpetrator of domestic violence should be removed from the Superior Court's records.)

PWG/crm

cc: Honorable E. Norman Veasey  
Honorable Randy J. Holland  
Honorable Henry duPont Ridgely  
Honorable Alex J. Smalls  
Honorable Vincent J. Poppiti  
Honorable Alicia Howard  
Keith R. Brady, D.A.G.  
All Delaware Police Agencies  
All Justice of the Peace Courts  
Alderman's Courts  
Thomas W. Nagle  
Anna A. Lewis  
H. John Betts  
Larry Sipple  
Donzel Harris, Administrative Office  
Law Libraries: New Castle County, Kent County, Sussex County,  
Widener University School of Law  
Digilaw, Inc.